IN THE

JOHN F. DAVIS, CLERK

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1377~~ 148

LOUIS EUGENE SUDDUTH,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari Directed to the Supreme Court of the State of California

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PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE EARL WARREN AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Comes now Louis Eugene Sudduth and petitions this Court for a writ of certiorari directed to the Supreme Court of the State of California to review and reverse a judgment affirming the petitioner's conviction of misdemeanor driving while intoxicated.

JURISDICTION

Jurisdiction is conferred by Title 28, Section 1257(3), U. S. Codes, and by an order of extension of Justice

Douglas extending the time to file the petition for certiorari.

The decision of the Supreme Court of California was rendered December 23, 1966. A petition for rehearing was duly filed and denied on January 20, 1967. Application was duly made for extension of time to the Honorable Justice Douglas and said time was extended to and including May 10, 1967.

OPINION BELOW

The decision of the Supreme Court of California is reported in 65 A.C. 585, 55 Cal.Rptr. 393, and a copy thereof is set forth herein in Appendix A.

The previous decision of the District Court of Appeal is reported in 243 A.C.A. 563, 52 Cal.Rptr. 527.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment, United States Constitution:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, United States Constitution:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Fourteenth Amendment, United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 13, California Constitution:

§ 13. Criminal cases; speedy and public trial; process for witnesses; appearance and defense; counsel; double jeopardy; self-incrimination; due process; failure to explain or deny; depositions

Sec. 13. In criminal prosecutions, in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel. No

person shall be twice put in jeopardy for the same offense; nor be compelled, in any criminal case, to be a witness against himself; nor be deprived of life, liberty, or property without due process of law; but in any criminal case, whether the defendant testifies or not, his failure to explain or to deny by his testimony any evidence or facts in the case against him may be commented upon by the court and by counsel, and may be considered by the court or the jury. The Legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases, other than cases of homicide when there is reason to believe that the witness, from inability or other cause, will not attend at the trial. (Amended Nov. 6, 1934.)

Section 23102, Vehicle Code of California:

§ 23102. Misdemeanor drunk driving

(a) It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway. Any person convicted under this section shall be punished upon a first conviction by imprisonment in the county jail for not less than 30 days nor more than six months or by fine of not less than two hundred fifty dollars ($250) nor more than five hundred dollars ($500) or by both such fine and imprisonment and upon a second or any subsequent conviction, within seven years of a prior conviction, by imprisonment in the county jail for not less than five days nor more than one year and by a fine of not less than two hundred fifty dollars ($250) nor more than one thousand dollars ($1,000). A conviction under this section shall be

deemed a second conviction if the person has previously been convicted of a violation of Section 23101 of this code.

(b) If any person is convicted of a second or subsequent offense under this section within seven years of a prior conviction and is granted probation, it must be a condition of probation that such person be confined in jail for at least five days but not more than one year and pay a fine of at least two hundred fifty dollars ($250) but not more than one thousand dollars ($1,000).

(c) If the person convicted under this section is under the age of 21 years and the vehicle used in any such violation is registered to such person, the vehicle may be impounded at the owner's expense for not less than one day nor more than 30 days.

THE FACTS

The basic facts are that petitioner was arrested on March 17, 1965 at approximately 2:10 in the morning (R.T. 6) at Devonshire and Havenhurst Streets in Los Angeles County by Officer E. O. Wilson. The vehicle was eastbound on Devonshire and made a right hand turn. The officer had observed the car in response to a call and pulled the driver over to the curb.

At that time petitioner got out of the car and approached the police vehicle. The officer testified that he noticed petitioner was very unsteady on his feet. (R.T. 10) He observed him walking and it appeared to the officer that he was walking unsteadily; instead of placing his feet directly in front of one another, he was more or less to the side and not in line. He approached petitioner

and asked for his operator's license. Petitioner fumbled in his wallet approximately 30 seconds. (R.T. 10)

He then proceeded to inform petitioner of his rights, his right to counsel, his right to remain silent and also that anything he said could be used against him in subsequent proceedings. (R.T. 11)

The officer then stated he was going to explain and demonstrate and administer what he called a Field Sobriety Examination, a series of tests to determine the sobriety of a party. At that time he attempted to demonstrate the walk the line test, during which time petitioner kept up a running line of conversation with the officer's partner and he had to interrupt him several times to get his attention to the examination he was attempting to demonstrate. (R.T. 10) The answer of petitioner was "I'm not going to take your test." He repeated he was not going to take the test and the officer kept demonstrating the walk the line test, at which time petitioner said he refused to take any tests.

The officer then asked him a series of questions as to whether he was injured or sick or whether he was diabetic or took insulin or whether he had any physical defects, all of which questions he declined to answer. (R.T. 13) The officer asked him what time it was and he again refused to answer. All of this proceeding was testified to before the jury. He was also asked when he last slept, which he refused to answer; how many hours sleep he had, which he declined to answer. (R.T. 15-16) The officer wrote down the questions and his failure to answer. (R.T. 16)

Then they proceeded to the station, at which time the Breathalizer examination was assembled, explained and petitioner at this time refused this examination. (R.T. 16) A Breathalizer is a mechanical device designed to analyze and chart the amount of alcohol in a person's breath and to compare this in percentage to blood alcohol. It has not been accepted by the State of California, nor any state, as scientifically accurate nor as a determination of proof of driving while under the influence of intoxicating liquor. The test is administered in the absence of any attorney or representative of a defendant and the product of the test itself is not subject to re-examination or cross-examination.

The prosecutor said petitioner's refusal to take the Breathalizer test was proof of his guilt. (R.T. 70) The evidence of petitioner's refusal also to take tests was commented on in the prosecutor's argument to the jury and the jury was instructed as follows on the significance of such evidence:

> "YOU ARE INSTRUCTED that in a case where a defendant is accused of violating Section 23102 of the Vehicle Code it is permissible to prove that the defendant was offered a Breathalizer test or other sobriety test after he or she has been aware of the nature of the test and its effect. The fact that such test is refused under such circumstances is not sufficient standing alone and by itself to establish the guilt of a defendant but is a fact which if proven may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not such conduct shows a consciousness of guilt and the significance to be

attached to such a circumstance are matters for your determination." (Pet. for Hearing, p. 17)

The Supreme Court of California affirmed the judgment holding it a suspension of no constitutional right to refuse a test designed to produce physical evidence in the form of a Breathalizer sample, regardless of whether counsel is present, and that a refusal to cooperate with law enforcement officers does not qualify for the protection of the Fifth and Fourteenth Amendments.

This counsel raised the constitutional issues of violation of the Fifth and Fourteenth Amendments U.S. Constitution before the District Court of Appeal, Second Appellate District, State of California, where he first appeared in the case. That court overruled his objections and affirmed the judgment. (243 A.C.A. 563, 52 Cal. Rptr. 527) The violation of the Fifth and Fourteenth Amendments were raised again in the Supreme Court of California and denied by that court.

QUESTIONS PRESENTED

1. Whether the Fifth and Fourteenth Amendments to the Constitution of the United States, as applied to the states in *Griffin v. California,* 380 U.S. 609, 14 L.ed.2d 106, and *Malloy v. Hogan,* 378 U.S. 1, 12 L.ed.2d 653, apply to one arrested for alleged drunk driving in violation of Section 23102 of the Vehicle Code of California.

2. Whether one can be compelled, upon being arrested for violation of the Vehicle Code, to take a Breathalizer test regardless of whether counsel is present or not and whether his refusal to take such a test may be intro-

duced in evidence and commented on before the jury to bring about a defendant's conviction and whether such procedure and proceeding does not violate the Fifth and Fourteenth Amendments to the Constitution of the United States.

3. Whether testimony regarding the refusal to take a test as outlined by police officers, in the absence of counsel, and testimony regarding refusal to collaborate with police to bring about one's own conviction of crime violates the Fifth and Fourteenth Amendments to the Constitution of the United States.

4. Whether the giving of a so-called Breathalizer test, where the product is not available for examination and cross-examination by the defendant and his counsel, denies the right of confrontation as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

5. Whether a test which is not approved by a state legislature as being scientifically complete and accurate may be offered and used by police officers as a basis for developing evidence against an accused and forming the basis of his conviction.

6. Whether the court erred in its instruction to the jury regarding the refusal to take the so-called Breathalizer test and whether such instruction that a jury may consider such refusal to arrive at its verdict offended the Fifth and Fourteenth Amendments to the Constitution of the United States.

REASONS FOR GRANTING THE WRIT

The question presented here is one of great importance in the administration of criminal law and is another one of the series of cases in which California has sought to circumvent this Court's decision on the subject of self-incrimination guaranteed by the Fifth and Fourteenth Amendments U.S. Constitution.

The California court in *People v. Sudduth* said:

> "Suspects have no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample whether or not counsel is present."

This Court has said, in *Malloy v. Hogan*, 378 U.S. 1, 12 L.ed.2d 653:

"The marked shift to the federal standard in state cases began with Lisenba v California, 314 US 219, 86 L ed 166, 62 S Ct 280, where the Court spoke of the accused's 'free choice to admit, to deny, or to refuse to answer.' Id., at 241, 86 L ed at 182. See Ashcraft v Tennessee, 322 US 143, 88 L ed 1192, 64 S Ct 921; Malinski v New York, 324 US 401, 89 L ed 1029, 65 S Ct 781; Spano v New York, 360 US 315, 3 L ed 2d 1265, 79 S Ct 1202; Lynumn v Illinois, 372 US 528, 9 L ed 2d 922, 83 S Ct 917; Haynes v Washington, 373 US 503, 10 L ed 2d 513, 83 S Ct 1336. The shift reflects recognition that the American system of criminal prosecution is accusatorial, not inquisitorial, and that the Fifth Amendment privilege is its essential mainstay. Rogers v Richmond, 365 US 534, 541, 5 L ed 2d 760, 766, 81 S Ct 735. Governments, state and federal, are thus constitutionally com-

pelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth. Since the Fourteenth Amendment prohibits the States from inducing a person to confess through 'sympathy falsely aroused,' Spano v New York, supra, 360 US at 323, 3 L ed 2d at 1272, or other like inducement far short of 'compulsion by torture,' Haynes v Washington, supra, it follows a fortiori that it also forbids the States to resort to imprisonment, as here, to compel him to answer questions that might incriminate him. The Fourteenth Amendment secures against state invasion the same privilege that the Fifth Amendment guarantees against federal infringement — the right of a person to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty, as held in Twining, for such silence.

"This conclusion is fortified by our recent decision in Mapp v Ohio, 367 US 643, 6 L ed 2d 1081, 81 S Ct 1684, 84 ALR2d 933, overruling Wolf v Colorado, 338 US 25, 93 L ed 1782, 69 S Ct 1359, which had held 'that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure,' 338 US, at 33, 93 L ed at 1788. Mapp held that the Fifth Amendment privilege against self-incrimination implemented the Fourth Amendment in such cases, and that the two guarantees of personal security conjoined in the Fourteenth Amendment to make the exclusionary rule obligatory upon the States. We relied upon the great case of Boyd v United States, 116 US 616, 29 L ed 746, 6 S Ct 524, decided in 1886, which, considering the Fourth and Fifth Amendments as running 'almost into each

other,' id., at 630, 29 L ed at 751, held that 'Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of [those Amendments]. . . .'"

The Supreme Court of California assumes that the Breathalizer test is scientifically accurate and complete. There has been no such holding or finding by the State of California and various courts have held that the Breathalizer test is subject to several errors.

In *State v. Baker*, 56 Wash.2d 846, 355 P.2d 806, the Court reversed a Breathalizer conviction for lack of foundation to show prima facie the following requirements that must be introduced by the prosecution before the Breathalizer test evidence is admissible:

1. That the machine was properly checked and in proper working order at the time of conducting the test.

2. That the chemicals employed were of the correct kind and compounded in the proper proportion.

3. That the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within 15 minutes prior to the test.

4. That the test was given by a qualified operator and in the proper manner.

In California, no such requirement was shown to have been had nor was it shown that even with such requirement that the test would be accurate.

The California court misconceived this Court's interpretation of *Boyd v. United States,* 116 US 616, 29 L.ed. 746, *Malloy v. Hogan,* 378 US 1, 12 L.ed.2d 653, *Griffin v. California,* 380 US 609, 14 L.ed.2d 106, and *Murphy v. Waterfront Commission of New York,* 378 US 52, 12 L.ed.2d 678.

This Court in *Boyd* said:

> "... but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used to convict him of crime or to forfeit his goods is within the condemnation of [those Amendments]."

We can conceive of nothing more violative of extorting a man's own testimony than to line him up immediately after his arrest, advise him that he doesn't have to say anything and that anything he might say could be used against him and then to demonstrate a so-called Field Sobriety Test, which he refuses to take, ask him several questions, which he refuses to answer, ask him to take a machine test of unknown results or capacity, by unknown and probably inexperienced police operators, without any chance to have counsel present or cross-examine the result, and then use the advice that the officer gave that he didn't have to do any of those things and the fact that he followed that advice and didn't, as evidence that could be used to convict him.

If the officer's conduct in trying to force the petitioner to make statements, to take a Field Test and to take a Breathalizer test, is not inquisitorial, then we do not know the correct definition of the word. We respectfully submit that it certainly was not accusatorial, as set out in

Malloy v. Hogan, supra, and that suspension under our American system of government to have a constitutional right to take a test or any test which requires their collaboration with officers in bringing about their own conviction.

We pray that this Court grant certiorari and reverse the judgment below.

Respectfully submitted,
MORRIS LAVINE
Attorney for Petitioner

APPENDIX A

See Crim. 10346
Peo. v. Ellis Attached
as referred to herein.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

THE PEOPLE, *Plaintiff and Respondent,* v. LOUIS EUGENE SUDDUTH, *Defendant and Appellant.*	Crim. 10399

Filed Dec. 23, 1966.

William I. Sullivan, Clerk, S. F. Deputy.

A municipal court jury found defendant guilty of the misdemeanor of driving while under the influence of intoxicating liquor (Veh. Code, § 23102). Judgment was entered on the verdict, and defendant appealed, contending that his privilege against self-incrimination was violated by the admission of evidence of, and by the comment on, his refusal to take a breathalyzer test to determine the percentage of alcohol in his blood. The appellate department of the superior court affirmed the judgment. The Court of Appeal transferred the case on its own motion because of the constitutional question involved (Cal. Rules of Court, rule 62(a)) and affirmed the judgment. We granted a hearing because substantially the same constitutional question was before us in People v. Ellis, Crim. 10346, *ante*, p. ..... (65 A.C. 751)

Officer Wilson of the Los Angeles Police Department testified that in response to a radio call reporting a driver under the influence of intoxicating liquor he and a fellow officer stopped defendant's car, which answered the radioed description and was observed making an unusual turning maneuver. Defendant was very unsteady when he got out of his car and approached the officers, and he produced his driver's license only after considerable fumbling in his wallet. His breath smelled strongly of alcohol.

Officer Wilson informed defendant of his rights to counsel and to remain silent and that anything he said could be used against him in a criminal proceeding. The officer then tried to explain and demonstrate a series of tests, known collectively as the Field Sobriety Examination, he proposed to administer to defendant. The examination consists of physical tests, such as walking a straight line, and a series of questions. While standing with the officers defendant was swaying to and fro and kept up a running line of one-sided conversation with Officer Wilson's partner. Defendant refused to take any of the physical tests and refused to answer any question except to respond with exculpatory statements to the inquiry as to how much he had drunk. Defendant was then taken to the police station where the equipment necessary to administer a breathalyzer test was assembled and its operation explained to him. He refused to take the test.

The evidence of defendant's refusals to take tests was commented on in the prosecutor's argument, and the jury was instructed on the significance of such evidence.

The reasoning in People v. Ellis, Crim. 10346, decided today, *ante*, p. ...., (65 A.C. 751) is fully applicable to

the question whether evidence of and comment on defendant's refusal to submit to a breathalyzer test is constitutionally admissible. Suspects have no constitutional right to refuse a test designed to produce physical evidence in the form of a breath sample (cf. ditto opin., pp. 2-7; People v. Zavala (1966) 239 Cal.App.2d 732, 738-739; People v. Dawson (1960) 184 Cal.App.2d Supp. 881, 883) whether or not counsel is present (People v. Gilbert (1965) 63 Cal.2d 690, 709).

We note that the physical and psychological disturbance of the individual involved in obtaining a breath sample is apt to be significantly less than that involved in extracting a blood sample, an evidence-gathering technique recently approved in Schmerber v. California (1966) 384 U.S. 757, and that the blood alcohol test and the breath test for alcoholic absorption are alternate means for determining the percentage of alcohol in the blood.[1] The value of such objective scientific data of intoxication to supplement the fallible observations by humans of behavior seemingly symtomatic of intoxication cannot be disputed. (People v. Duroncelay (1957) 48 Cal.2d 766, 772.) In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient, and accurate system of detection, enforcement and, hence, prevention. (See Breithaupt v. Abram (1957) 352 U.S. 432, 439.)

As in Ellis (People v. Ellis, Crim. 10346, ditto opin., p. 8), defendant's reliance on Griffin v. California, 380

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[1] See People v. Kovacik (1954) 205 Misc. 275, 282-290, 128 N.Y.S.2d 492, 499-506, for a discussion of the development of, and scientific basis for, the breath-testing technique.

U.S. 609, must be rejected. The sole rationale for the rule against comment on a failure to testify is that such a rule is a necessary protection for the exercise of the underlying privilege of remaining silent (*id.* at p. 614). A wrongful refusal to cooperate with law enforcement officers does not qualify for such protection. A refusal that might operate to suppress evidence of intoxication, which disappears rapidly with the passage of time (In re Newbern (1959) 175 Cal.App.2d 862, 866), should not be encouraged as a device to escape prosecution.

The disparate results found in other jurisdictions may be ascribed to the presence or absence of an underlying constitutional or statutory right to refuse to produce the physical evidence sought.[2] States that recognize a right to refuse to take such tests exclude evidence of a refusal.[3] States that recognize no right to refuse allow testimony and comment on the refusal.[4]

It is contended that the instruction[5] given by the court

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[2] See ann., 87 A.L.R.2d 370.

[3] Not unanimously, however. (State v. Bock (1958) 80 Idaho 296 [328 P.2d 1065, 1071-1073].)

[4] See ann., 87 A.L.R.2d 370.

[5] "YOU ARE INSTRUCTED that in a case where a defendant is accused of violating Section 23102 of the Vehicle Code it is permissible to prove that the defendant was offered a breathalyzer test or other sobriety test after he or she has been aware of the nature of the test and its effect. The fact that such test is refused under such circumstances is not sufficient standing alone and by itself to establish the guilt of a defendant but is a fact which if proven may be considered by you in the light of all other proven facts in deciding the question of guilt or innocence. Whether or not such conduct shows a consciousness of guilt and the significance to be attached to such a circumstance are matters for your determination."

on defendant's refusal to submit to a sobriety test erroneously authorized the jury to consider defendant's silence in response to questions at the time of his arrest, when such silence could not be considered evidence of guilt because it was an exercise of his constitutional right.[6] We do not believe, however, that the jury would understand the instruction to refer to defendant's refusal to answer questions as distinguished from his refusal to participate in a test. The instruction specifically refers to refusal to take "a breathalyzer test or other sobriety test after he or she has been [made] aware of the nature of the test and its effect" and the prosecutor did not comment on defendant's failure to answer questions, but only on his refusal to take tests.

Defendant contends that the trial court erred in sustaining an objection to his counsel's argument to the jury

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[6] Both the federal rule, e.g., Ivey v. United States (1965) 344 F.2d 770, 772-773; Helton v. United States (1955) 221 F.2d 338, 341-342, applicable to the states through Malloy v. Hogan (1964) 378 U.S. 1, and our own rule, People v. Simmons (1946) 28 Cal.2d 699, 718-719, might have operated to exclude the testimony of defendant's silence in response to questions by the police. (Cf. Griffin v. California (1965) supra, 380 U.S. 609, 614.) Defendant's failure to object precludes his challenging the admission of the evidence of refusal to answer questions. The issue here, therefore, is limited to the propriety of the jury instruction.

on his refusal to take the sobriety test.[7] Counsel has the right to argue reasons alternative to consciousness of guilt to explain defendant's refusal. Moreover, the court may in its discretion even allow counsel to incorporate correct statements of law in his argument (People v. Linden (1959) 52 Cal.2d 1, 29; People v. Dykes (1930) 107 Cal.App. 107, 118), but it must sustain an objection to an incorrect statement of law (People v. Atwood, 214 Cal.App.2d 308, 309). In the present case the court sustained an objection to, and ordered stricken, only that part of counsel's argument that incorrectly assumed that defendant had a constitutional right to refuse the test.

The judgment is affirmed.

TRAYNOR, C.J.

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[7] "I submit there is a lot of evidence about refusing to take the test. It is always kind of puzzling to me how they can advise somebody, 'Now, listen, Mr. Sudduth, you don't have to take this test if you don't want to. You can see an attorney if you want to.' Or 'You don't have to make any statement if you don't want to.' And then they are amazed or astounded when the man says, 'Well, you advised me of my rights; I'll follow your advice. I won't take the test.' They make a big thing out of refusal to take the test. *I am wondering about the effect of a Constitutional right if when you take advantage of it and it is used against you in court.*

"MR. REISNER: Well, your Honor, that would be a matter of law and it has certainly been decided it is a valid comment and inference.

"THE COURT: The *last comment* of counsel will be stricken. They are not to decide the legal aspects of what is a Constitutional right and what is not. That will be stricken." (Italics added.)

WE CONCUR:

McCOMB, J.
PETERS, J.
TOBRINER, J.
MOSK, J.
BURKE, J.
* PEEK, J.

* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA IN BANK

THE PEOPLE, *Plaintiff and Respondent,* vs. PHILLIP D. ELLIS, *Defendant and Appellant.*	Crim. 10346

Filed Dec. 23, 1966.

William I. Sullivan, Clerk, S. F. Deputy.

Defendant appeals from a judgment of conviction entered upon a verdict finding him guilty of assault with intent to commit rape (Pen. Code, § 220).

The victim testified that while she was waiting for a bus in Burlingame at 5 a.m., July 20, 1964, defendant sought to induce her to engage in sexual intercourse. When she rebuffed him, he threatened to use his knife to compel submission. She saw no knife, but fled screaming, and defendant ran beside her repeatedly whispering, "Walk. Don't run." When a newspaper boy appeared on the otherwise deserted street defendant disappeared.

Defendant was arrested on September 9, 1964, and taken to the San Mateo Police Department, where the victim identified him in a lineup as her assailant. The victim also indicated that she could identify her assailant's voice.

SEE DISSENTING OPINION

She was placed in a room next to the interrogation room, and defendant was asked to repeat phrases recited by the police. Defendant refused to cooperate and remained silent.

Police officers testified that they advised defendant of his right to counsel and of his right to remain silent and testified to his responses to their questions. They also testified that he refused to participate in the voice identification test. Defendant contends that introduction of the evidence of his refusal to participate in a voice identification test and the prosecutor's comments thereon violated his constitutional privilege against self-incrimination.

The privilege against self-incrimination applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him. (E.g., Schmerber v. California (1966) 384 U.S. 757, 764; Holt v. United States (1910) 218 U.S. 245, 252-253; Gilbert v. United States, No. 19,940 (9th Cir., Sept. 16, 1966); United States v. Denno (2d Cir. 1966) 355 F.2d 731, 738; Rigney v. Hendrick (3d Cir. 1965) 355 F.2d 710, 713-714; Kennedy v. United States (D.C. Cir. 1965) 353 F.2d 462, 466; Caldwell v. United States (8th Cir. 1964) 338 F.2d 385, 389; People v. Lopez (1963) 60 Cal.2d 223, 243-244; People v. Duroncelay (1957) 48 Cal.2d 766, 770; People v. Trujillo (1948) 32 Cal.2d 105, 112-113; People v. Zavala (1966) 239 Cal.App.2d 732, 738-739; 8 Wigmore, Evidence (McNaughton rev. 1961) § 2265, p. 386; Model Code of Evidence (1942) rule 201 (2); Uniform Rules of Evidence (1953) rule 23 (3). The results of voice identification tests fall within the category of real or physical

evidence. (Gilbert v. United States, supra; Rigney v. Hendrick, supra; People v. Lopez, supra;[1] Wigmore, op. cit., supra; cf. People v. Graves (1966) 64 A.C. 216, cert. den., 385 U.S. .....) In such a test, the speaker is asked, not to communicate ideas or knowledge of facts, but to engage in the physiological processes necessary to produce a series of articulated sounds, the verbal meanings of which are unimportant. The sounds alone are elicited for identification purposes through characteristics such as pitch, tone, intonation, accent, and word stress. The speech patterns of individuals are distinctive[2] physical characteristics that serve to identify them just as do other physical characteristics such as color of eyes, hair, and skin, physical build and fingerprints.

Voice identification testimony is the product of an observable physical characteristic made by an independent witness. It is the very type of objective factual evidence, independent of information communicated by the

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[1] Other state authority is collected at 16 A.L.R.2d 1322-1328; 2 A.L.R.2d Later Case Service. See also State v. Freeman (Kan. 1965) 195 Kan. 561, 408 P.2d 612; State v. King (N.J. 1965) 209 A.2d 110; Boyer v. State (Fla. App. 1966) 182 So.2d 19. For an analysis of the limited state authority that excludes voice identification see Recent Cases: (1949) 24 Ind.L.J. 587.

[2] Even the untutored ear usually can distinguish a male voice from a female voice, a foreign accent from a local accent, a lisp from conventional speech, or identify a peculiar way of pronouncing certain words. It has been reported that voices can be electronically compared by "voiceprints" and identified with much the same reliability as fingerprints. (Newsweek, April 25, 1966; 89 Science News 293 (1966).)

accused, that the privilege encourages police to seek.[3] Moreover, independent identification testimony, unlike testimonial evidence derived from the accused, raises no question of reliance on the veracity of the accused.[4] Any attempt by a suspect to disguise his voice is apt to be detected readily by those persons present who can compare the sample with his normal voice. Furthermore, there is no risk that one could be coerced into falsely accusing himself. It is difficult to imagine how a suspect could be induced to impersonate an unknown voice to incriminate himself.

It has been urged that the privilege reflects an ultimate sense of fairness that prohibits the state from demanding assistance of any kind from an individual in penal proceedings taken against him.[5] The privilege includes no

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[3] Escobedo v. Illinois (1964) 378 U.S. 478, 488-489; People v. Graves, supra, 64 A.C. 216, 219; 8 Wigmore, Evidence (McNaughton rev. 1961) § 2251.

[4] The argument has been advanced that the mere act of speaking produces an implied testimonial element: an implied statement by the accused that "this is my voice." (Weintraub, *Voice Identification, Writing Exemplars and the Privilege Against Self-Incrimination* (1957) 10 Vand.L.Rev. 485, 505.) This contention is logically correct, but it could easily include any situation where the subject is required to cooperate in making possible inspection of physical characteristics (i.e., stance, walk, facial features, writing, fingerprints, blood tests). The key issue, however, is the degree of reliance on the veracity of the accused. *(Ibid.)* The difficulty of deceit and the practical impossibility of a knowing attempt at a false self-incrimination, through a voice impersonation of a guilty party, lead us to reject this factor as not being significant in voice identifications. (See Comment (1948) 1 Vand.L.Rev. 248, 250.)

[5] See 8 Wigmore, Evidence (McNaughton rev. 1961) § 2251, pp. 317-318.

such prohibition. Criminal proceedings are replete with instances where at least passive cooperation of an accused may be constitutionally required.[6]

A suspect asked to speak for voice identification is not subjected to the same psychological pressures said to be generated by a demand for testimony.[7] It is no more unfair to ask a suspect to speak for voice identification than to ask him to appear in a lineup for visual identification. The psychological pressures are reduced to the same degree, through a limitation of alternatives. Deceit is improbable; the simple choice for a guilty person is between conduct likely to expose incriminating evidence

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[6] Examples are set forth at 8 Wigmore, Evidence (McNaughton rev. 1961) § 2265, pp. 387-397. They include fingerprinting, photographing, or measuring of the subject, taking imprints of portions of a suspect's body, removal of or placing articles of clothing on the subject, and requiring the accused's presence at the trial itself.

A controlling distinction sometimes made between active and passive cooperation is, in terms of the reasons for the existence of the privilege, more apparent than real. "This is a distinction which is aesthetically attractive but which seems to have no basis in history, practicality or justice." (McCormick, Evidence (1954) § 126, p. 265.) Passive cooperation is affirmative cooperation; at least passiveness of the subject is required to take a fingerprint or a photograph. The subject can resist having a fingerprint or photograph taken. There is no greater likelihood that coercion would be employed or that a suspect would be disturbed physically or psychologically in those cases where "active" cooperation is requested than where "passive" cooperation is necessary.

[7] A demand for a statement is said to produce a "cruel trilemma." (Murphy v. Waterfront Comm'n (1964) 378 U.S. 52; 8 Wigmore, Evidence (McNaughton rev. 1961) § 2251, pp. 316-317.)

and inferences as to guilt likely to flow from a successful refusal to participate.

A related view of the individual interest protected by the privilege focuses on the right of privacy. (United States v. Grunewald (2d Cir. 1956) 233 F.2d 556, 581-582 (Frank, J., dissenting) revd. 353 U.S. 391; Ratner, *Consequences of Exercising the Privilege Against Self-Incrimination* (1957) 24 U.Chi.L.Rev. 472, 488-489.) The Fifth Amendment right of privacy protects at least uncommunicated thoughts and has been extended to preclude compelled production of private papers and documents. (Boyd v. United States (1886) 116 U.S. 616.) A voice test, however, contemplates no such intrusion into privacy; no disclosure of thought or privately held information is requested. One's voice is hardly of a private nature. It is constantly exposed to public observation and is merely another identifying physical characteristic.

It thus appears that an extension of the privilege to voice identification would serve none of the purposes of the privilege. It would only exclude evidence of considerable importance when visual identification is doubtful or impossible. The masked robber, the telephone extortionist, and the attacker in the night may all seek refuge behind an extension of the privilege that would do little to further the welfare of accused persons in general. Denial of access to a pertinent identifying trait can only weaken a system dedicated to the ascertainment of truth.

We do not leave the individual unprotected. The need for protection is greater in confession cases where the

risk of police overzealousness is comparatively great because self-incriminating statements are the most persuasive evidence of guilt. Testimony by a witness resulting from a purported identification is less conclusive and there is therefore less incentive for police to use unwarranted pressure in obtaining the evidence. Nevertheless, it bears emphasis that, as in the case of all police procedures for the securing of nonprivileged evidence, fundamental principles of fairness and due process are always applicable to prevent abuse. (See Rochin v. California (1952) 342 U.S. 165, People v. Matteson (1964) 61 Cal.2d 466.)

Even though evidence obtained from a voice identification is not within the privilege against self-incrimination, the question remains whether evidence and comment on a refusal to take such a test is admissible. It is clear that "it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation." (Miranda v. Arizona (1966) 384 U.S. 436, 468, fn. 37.) This doctrine is a logical extension (People v. Cockrell (1965) 63 Cal.2d 659) of the rule of Griffin v. California (1965) 380 U.S. 609, prohibiting comment on the failure of an accused to testify at trial. Comment on refusal to testify was held to be "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." (Griffin v. California, supra, at p. 614.) Such a rule is not applicable when, as in this case, the defendant has no constitutional right to refuse to speak solely for purposes of voice identification.

Nor was defendant's refusal to "display his voice" itself a testimonial communication. It was circumstantial evidence of consciousness of guilt, and like similar evidence, such as escape from custody (People v. Otis (1959) 174 Cal.App.2d 119), false alibi (People v. Allison (1966) 245 A.C.A. 590, 598), flight (People v. Hoyt (1942) 20 Cal.2d 306), suppression of evidence (People v. Burton (1961) 55 Cal.2d 328), and failure to respond to accusatory statements when not in police custody (see 19 Cal.Jur.2d, Evidence, § 401, p. 141 et seq.), its admission does not violate the privilege. Moreover, as in the foregoing examples, the evidence did not result from a situation contrived to produce conduct indicative of guilt. Unlike the superstitious tests described by Wigmore[8] and their modern successor, the lie detector,[9] that have as their sole purpose the establishment of

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[8] " 'In the olden time it was a popular superstition that the corpse of the slain would bleed afresh if touched by the murderer; and it was deemed almost conclusive of guilt that he who was charged with the murder refused to lay his finger on the body or to take his hand; . . .' " (2 Wigmore, Evidence 3d ed. 1940) § 275.)

[9] The lie detector operates on a principle of observable physiological deviations from the norm when an accused attempts to avoid verbal responses which he thinks will indicate guilt. It is designed to probe the conscious knowledge of the accused and in that respect sought-after responses may be viewed as essentially testimonial. (See Schmerber v. California, supra, 384 U.S. 757, 764.)

an environment in which the accused's consciousness of guilt can be detected, the purpose of asking defendant to speak was to obtain probative physical evidence and the conduct was merely incident to that effort. A guilty party may prefer not to find himself in a situation where consciousness of guilt may be inferred from his conduct, but it can scarcely be contended that the police, who seek evidence from the test itself, will tend to coerce parties into refusing to take tests in order to produce this evidence.[10]

Although conduct indicating consciousness of guilt is often described as an "admission by conduct,"[11] such nomenclature should not obscure the fact that guilty conduct is not a testimonial statement of guilt. It is therefore not protected by the Fifth Amendment. By acting like a guilty person, a man does not testify to his guilt but merely

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[10] Protection from possible police abuse in obtaining evidence is of course one of the primary reasons for the existence of the Fifth Amendment privilege, but the protection is unnecessary when police efforts in conducting voice tests will tend to prevent, not induce, the production of evidence of a refusal to cooperate.

[11] See, e.g., McCormick, Evidence, §§ 247-250.

exposes himself to the drawing of inferences from circumstantial evidence of his state of mind.[12]

We are aware that the United States Supreme Court in Schmerber v. California (1966) 384 U.S. 757, 765, fn. 9, has cautioned that in some cases the administration of tests might result in "testimonial products" proscribed by the privilege. We do not believe, however, that the inferences flowing from guilty conduct are such testimonial products. Rather, the court's concern seemed directed to insuring full protection of the testimonial privilege from even unintended coercive pressures. In the case of a blood test, for example, the court considered the possibility that fear induced by the prospect of having the test administered might itself provide a coercive device

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[12] Wigmore was careful to distinguish conduct as evidence of belief from admissions. He not only makes the general point that the term "implied admissions" is somewhat misleading, even when applied to witnesses in a civil case (2 Wigmore, Evidence (3d ed. 1940) § 267, p. 95), but he stresses that in criminal cases guilty conduct on the part of an accused is evidence in which the "circumstantial nature of the inference strongly dominates the testimonial aspect. . . ." (2 Wigmore, op. cit., supra, at p. 94.)

The inferential chain here is no different from that which makes any event that does not directly illuminate the circumstances of the crime charged a relevant fact. The trier of fact must reason from, for example, an escape from jail, to a consciousness of guilt that would motivate the escapee's conduct, and, from that premise, to the conclusion that such conduct is relevant to the ultimate issue of guilt or innocence. The key factor is that no testimony of an accused, or other equivalent intended to communicate knowledge, such as a writing, sign language, or a demonstration, forms the basis for the inferential chain.

to elicit incriminating statements.[13] Such a compelled testimonial product would of course be inadmissible.

Evidence of the refusal is not only probative; its admission operates to induce suspects to cooperate with law enforcement officials. Only the overriding interest in protecting the privilege against compulsory self-incrimination, itself the result of a delicate balance, prohibits evidence or comment in the refusal to testify cases. But the privilege itself is not at issue here. Without exception, none of the reasons that support the privilege lends support to a rule that would exclude probative evidence obtained from an accused's effort to conceal nonprivileged evidence.

In the present case, however, the police officers warned defendant that he had the right to remain silent and that anything he said could be used against him. This warning did not distinguish between speech in terms of communications and speech for voice identification, between a refusal to speak free from sanctions and a refusal to speak productive of detrimental inferences. That distinction would hardly occur to a layman unless it was called to his attention. Thus, defendant's refusal to speak might well have been the direct result of the police warning and cannot be used against him. (Cf. Johnson v. United States (1943) 318 U.S. 189; People v. Gilbert (1944) 25 Cal.2d 422, 443.)

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[13] "Indeed, there may be circumstances in which the pain, danger, or severity of an operation would almost inevitably cause a person to prefer confession to undergoing the search, and nothing we say today should be taken as establishing the permissibility of compulsion in that case." (Schmerber v. California, supra, 384 U.S. 757, 765, fn. 9.)

The usual Fifth Amendment warning that a suspect has a right to remain silent creates this problem, for if taken literally it includes the right not to speak at all.[14] After having given such a warning, if the police direct a defendant to speak for voice identification and he refuses, they must, as a prerequisite to the use of the defendant's refusal to speak as evidence of consciousness of guilt, advise him that the right to remain silent does not include the right to refuse to participate in such a test.

Defendant also assigns as error the prosecutor's repeated references to him and his alibi witness as perjurers. Interpretive, but fair, comment on evidence submitted to the jury is proper. The prosecutor should point out the conflicts and inconsistencies in the evidence and those evidentiary matters that render the prosecution testimony more believable than that submitted by the defense.

Prosecutors tread on dangerous ground, however, when they resort to epithets to drive home the falsity of defense evidence. (See People v. Love (1961) 56 Cal.2d 720, 731.) The term liar,[15] for instance, implies more than

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[14] Even if the warning is understood in this literal sense, however, it is not misleading if the evidence sought is not speech for voice identification but evidence of other physical characteristics such as photographs, fingerprints, or blood samples.

[15] The appellate court has characterized use of the term liar as "harsh," but "in the realm of fair comment." (People v. Mora (1956) 139 Cal.App.2d 266, 272-273.) In that case conflicting stories of witnesses were before the jury and no objection to the use of the term was made at the trial. (Cf. People v. Baker (1960) 183 Cal.App.2d 615, 624-625.)

offering untrue testimony; it implies a wilful falsehood. (Webster's New Internat. Dict. (2d ed. 1939).) The term perjurer has, as its only formal semantic distinction vis-a-vis liar, the additional element of the oath. (Webster's New Internat. Dict. (2d ed. 1939); see Pen. Code, §118.) A charge of perjury, however, produces more than moral opprobrium. Perjury is a felony, and the connotation conveyed to the jury is therefore apt to be far more derogatory than that conveyed by the term liar. Particularly when applied to the defendant, it is apt adversely and unnecessarily to affect the ability of the jury dispassionately to weigh the credibility of the accused and the issue of guilt or innocence. Unless the prosecutor is careful to state that his conclusion that perjury was committed is predicated solely on the evidence before the jury, the spectre of jury reliance on prosecutorial access to information outside the record is raised. (See People v. Perez (1962) 58 Cal.2d 229, 246.)

In attacking the credibility of defense witnesses, a single reference to a witness as having perjured himself, based on an analysis of the evidence before the jury, may be unobjectionable. (Cf. People v. Muir (1966) 244 A.C.A. 679, 682-683.) When, however, as in this case, the prosecutor makes repeated references to defendant

and his wife as perjurers,[16] notwithstanding objection, and further makes a suggestion that the issue of perjury bears directly on the issue of guilt,[17] his argument constitutes

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[16] Prosecutor: "I had to bring them all back, every single instance where he was pinned down, it turned out he was talking a lie, l-i-e, lie, and that went throughout this entire trial. This trial has been loaded with perjury and lies; not one single witness for the People was shaken on cross-examination."

Defense Counsel: "Your Honor, I am going to object to that allegation as to perjury. . . ."

Prosecutor: "I didn't say 'perjury.' I said lies."

Defense Counsel: "He said perjury."

The Court: "Your statement was that your case was loaded down with perjury, counsel."

Prosecutor: "Oh, well, with lies. And it was, wasn't it? Did you ever hear such a mob as testified in this case for the defense?" (Rep. Tr., vol. 3, pp. 27, 28.)

Prosecutor: "[B]ecause of her [defendant's wife] affection for this defendant, for the want of stronger terms, she got on the stand and she actually perjured herself. She swore on an oath before God, so help me God, I will tell the truth. . . ." (Rep. Tr., vol. 3, p. 31.)

Prosecutor: "He has the receipt from Sacramento dated September 5th, that was the very foundation of two crimes of perjury right here in this courtroom. Him and his wife." (Rep. Tr., vol. 3, p. 32.)

Prosecutor: "[H]e [defendant] put his poor wife on the stand and made a perjurer out of her. . . ." (Rep. Tr., vol. 3, p. 34.)

Prosecutor: "[I]f you accept the word of an acknowledged perjurer and the word of an acknowledged perjurer's wife. . . ." (Rep. Tr., vol. 3, p. 61.)

[17] "[Y]ou can do nothing else but find a perjurer guilty of the charge." (Rep. Tr., vol. 3, p. 35.)

misconduct. (Cf. People v. Conover (1966) 243 A.C.A. 38; People v. Reese (1963) 220 Cal.App.2d 143.)

The question remains whether the errors were prejudicial. The evidence presents clearly conflicting stories regarding the crime charged. The victim's identification of defendant was supported by the newsboy, who was unable to identify defendant, but who testified that defendant's car was "similar to the one" he had seen the assailant drive. Defendant and his wife testified that they remained at a bowling alley in Richmond until 4:30 on the morning of the assault, at which time they drove back to Redwood City by way of San Jose. Two independent witnesses, the bowling alley proprietor and his wife, testified to the presence of defendant and his wife at the bowling alley and to their departure at an hour that would have precluded the possibility of defendant's presence at the scene of the crime.

Defendant was identified by three women who testified to five incidents ranging from indecent exposure to use of obscene language in a solicitation to sexual intercourse. None of these incidents involved violence. The first woman's identification was based on a single midnight encounter that had occurred two years earlier. Defendant denied the incident. The second woman testified to being followed in the early morning hours by a man in a car who ran towards her when she parked her car and began walking toward her house. Defendant testified that he was lost that night, was merely attempting to orient himself, and had no evil intent.

The third woman identified defendant and testified to three incidents that occurred after the crime charged and

were spaced about two weeks apart. Defendant denied two of the incidents. As to the third incident, which occurred on September 6, 1964, defendant offered an alibi. He testified that both he and his wife were in Sacramento at a bowling tournament on that morning. Defendant's wife and his mother corroborated this alibi. Two disinterested rebuttal witnesses, however, testified that they accompanied defendant to Sacramento and participated in the bowling tournament, that defendant's wife did not make the trip, and that defendant drove back from Sacramento in time to leave the witnesses at a point near the scene of the incident more than an hour before it occurred.

The jury was presented with directly conflicting evidence supported by independent witnesses on both sides. The evidence of consciousness of guilt improperly interjected a factor particularly damaging in a case where the defense is an alibi. The improper argument made the crucial task of objectively weighing the conflicting evidence susceptible to a subjective rejection of the defense evidence. We find, therefore, that it is reasonably probable that a result more favorable to defendant would have

been reached absent the errors. (People v. Watson (1956) 46 Cal.2d 818, 836.)

The judgment is reversed.

TRAYNOR, C. J.

WE CONCUR:

PETERS, J.
TOBRINER, J.
BURKE, J.
*PEEK, J.

* Retired Associated Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

PEOPLE v. ELLIS

Crim. 10346

DISSENTING OPINION OF MOSK, J.

TO

OPINION OF TRAYNOR, C. J.

I dissent.

The majority opinion easily persuades me that "voice identification is not within the privilege against self-incrimination," and that the rule of Griffin v. California (1965) 380 U.S. 609, is inapplicable when the defendant has no constitutional right to refuse to speak solely for purposes of voice identification.

Our problem ends with the foregoing determination. The adoption of yet another rule for police procedure adds a superfluous burden to what the majority has appropriately called "a system dedicated to ascertainment of truth."

A defendant warned that he has a right to remain silent understands he cannot be compelled to give a statement relating to the offense he is suspected of committing. But certainly he cannot reasonably infer from the mandatory admonition that he may remain mute thereafter for all purposes. He is required to respond when asked his name, address, place of employment, next of kin, name of his attorney, and other relevant biographical information. When he goes to court, he may be

asked similar questions, and generally he is expected to personally announce his plea (Pen. Code, § 1018). Queries of that type and the vocal response are designed not to effectuate self-incrimination but to achieve an orderly administration of justice.

Of a more substantive nature are other permissible efforts of the state to obtain the facts necessary for ascertainment of the truth, through fingerprinting, photographing, measuring the suspect; imprinting a portion of the suspect's body; physical examination of the body; removal of or placing articles of clothing on the suspect; requiring the suspect to stand, assume a stance, walk, make a particular gesture, to write for identification; requiring the suspect to appear in a lineup and in court; or *listening to his voice*. (8 Wigmore, Evidence (McNaughton rev. 1961) pp. 387-399.) Nothing in *Griffin* suggests the impropriety of commenting on defendant's refusal to render at least passive cooperation with the foregoing procedures. Indeed, *Griffin* is limited to prohibiting "comment on the refusal to testify . . . [because it] is a penalty imposed by courts for exercising a constitutional privilege." (P. 614.)

I harbor serious doubts as to the ability of peace officers to devise a comprehensible warning, as required by the majority, that will "distinguish between speech in terms of communication and speech for voice identification, between a refusal to speak free from sanctions and a refusal to speak productive of detrimental inferences." If this is too subtle a distinction for laymen, it is equally so for those in the field of law enforcement.

Since we found no self-incrimination problem involved here and *Griffin* is inapplicable, I perceive no bar to affirming the judgment and I would do so.

MOSK, J.

I CONCUR:

McCOMB, J.

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IN THE

Supreme Court of the United States

October Term, 1966
No. 1377

LOUIS EUGENE SUDDUTH,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT.

Petitioner was charged by the People of the State of California in a verified complaint filed in the Municipal Court of the Los Angeles Judicial District with a violation of Section 23102(a),[1] of the Vehicle Code of the State of California, a misdemeanor.

He was duly arraigned, informed of the charge against him and of his legal rights, entered a plea of not guilty and demanded a jury trial.

Petitioner was convicted of violating Vehicle Code Section 23102(a). He appealed to the Appellate Department of the Superior Court for the County of Los Angeles, which court affirmed the judgment of convic-

[1] "It is unlawful for any person who is under the influence of intoxicating liquor, or under the combined influence of intoxicating liquor and any drug, to drive a vehicle upon any highway."

tion with an unreported written opinion on December 21, 1965. The California Court of Appeal affirmed the judgment of conviction with a written opinion on July 13, 1966. (52 Cal. Rptr. 527.) The California Supreme Court affirmed the judgment of conviction with a written opinion on December 23, 1966. (65 A.C. 585; 55 Cal. Rptr. 393; 421 P. 2d 401.) A Petition for Rehearing was denied on January 19, 1967.

FACTS.

On March 17, 1965, at 2:10 A.M. the petitioner was observed making a right turn from the lane next to the double yellow lines. [R. T. p. 7.] Before making the right turn, during the turn and after the turn had been completed, the petitioner's vehicle was 20 feet from the righthand curb. [R. T. p. 8.] Los Angeles police officers stopped the petitioner's vehicle.

As the police officer got out of his vehicle, the petitioner stepped from his vehicle and approached the officer. The officer noted that the petitioner was very unsteady on his feet, swaying to and fro. [R. T. p. 10.]

Petitioner was asked for his driver's license and after fumbling through his wallet for thirty seconds gave the officer a department store credit card. [R. T. p. 10.] About two minutes later he produced his driver's license. [R. T. p. 11.] A strong odor of an alcoholic beverage was noted on petitioner's breath [R. T. p. 11]; his eyes were bloodshot and glassy and had a slow reaction to light [R. T. p. 33]; his speech was slow and thick. [R. T. p. 18.] The officer formed the opinion the petitioner was drunk. [R. T. p. 20.]

The officer informed the petitioner that he had the right to an attorney, that he had the right to remain si-

lent and that anything he said could be used against him in any subsequent criminal proceeding. [R. T. p. 11.]

The walk-the-line phase of the Field Sobriety Examination was explained to the petitioner and he stated "I'm not going to take your test." [R. T. p. 11.] When asked if he had had anything to drink, petitioner at first replied, "Nothing," then he said he had had "two beers," then he said he had had "Nothing." [R. T. p. 14.] Petitioner was arrested. [R. T. p. 18.]

At the police station a Breathalyzer Examination was assembled and explained to the petitioner. Petitioner refused the test. [R. T. p. 18.]

ISSUES PRESENTED.

I.

Petitioner Had No Right to Decline a Blood-Alcohol Test.

A suspect has no constitutional right to refuse a test designed to produce evidence in the form of a breath sample whether or not counsel is present.

Schmerber v. California (1966), 384 U.S. 751, 16 L.Ed. 2d 908.

People v. Sudduth (1966), 65 A.C. 585, 55 Cal. Rptr. 393, 421 P. 2d 401.

Petitioner, arrested for driving a motor vehicle while under the influence of intoxicating liquor, was offered a Breathalyzer test which would determine the amount of alcohol in the blood. A blood-alcohol test protects one who has the odor of alcohol on his breath, but has not been drinking to excess and one whose conduct may create the appearance of intoxication when he is suffering from some physical condition over which he has no

control. A blood-alcohol test may serve to exonerate as well as convict. (*In re McDonald* (1967), 249 A.C.A. 1079, 1082, 58 Cal. Rptr. 29; *Breithaupt v. Abram* (1957), 352 U.S. 432, 439, 1 L.Ed. 2d 448, 453).

Petitioner refused to take a Breathalyzer test. The breath method of determining the amount of alcohol in the blood has the advantage of prompt and easy administration by non-medically trained personnel and with relatively inexpensive equipment. The Drunkometer (*People v. Kovacik* (1954), 128 N.Y.S. 2d 492, 205 Misc. 275), the Intoximeter (*People v. Sykes* (1965), 238 Cal. App. 2d 156, 47 Cal. Rptr. 596) and the Breathalyzer are some of the devices that "are now generally scientifically recognized as sufficiently reliable." (*State v. Johnson* (1964), 42 N.J. 146, 199 A. 2d 809, 822).

Courts should favor the adoption of scientific methods of crime detection where the demonstrated accuracy and reliability has become established and recognized. Breathalyzer test results have been accepted as scientifically reliable. (*State v. Rodell* (1962), 17 Wis. 2d 451, 117 N.W. 2d 278; *People v. Stringfield* (1962), 37 Ill. App. 2d 344, 185 N.E. 2d 381; *Pruitt v. State* (1965), 393 S.W. 2d 747; *City of Bremerton v. Osborne* (1965), 66 Wash. 2d 281, 401 P. 2d 973; *State v. Powell* (1965), 264 N.C. 73, 140 S.E. 2d 705; *Penny v. State* (1966), Okl. Cr., 410 P. 2d 553).

A state may constitutionally require the taking of a blood-alcohol test as a pre-requisite to the privilege of using the roads. (*Walton v. City of Roanoke* (1963), 204 Va. 678, 133 S.E. 2d 315; *Lee v. State* (1961), 187 Kan. 566, 358 P. 2d 765; *State v. Bock* (1958), 80 Idaho 296, 328 P. 2d 1065; *Prucha v. Dept. of Motor*

Vehicles (1961), 172 Neb. 415, 110 N.W. 2d 75; *Breithaupt, supra,* footnote 2).

Eighteen States have enacted so-called "implied consent" laws. The California Legislature approved of the *breath* method of determining the amount of alcohol in the blood when it enacted California Vehicle Code Section 13353 which went into effect on October 6, 1966.

> "Any person who drives a motor vehicle upon a highway shall be deemed to have given his consent to a chemical test of his blood, *breath* or urine for the purpose of determining the alcoholic content of his blood. . . . The person arrested shall have the choice of whether the test shall be of his blood, *breath* or urine. . . ."
>
> California Vehicle Code Section 13353.

The efficacy of a blood alcohol test depends upon it being made as soon as possible after the time of the offense. The intoxicating effect of alcohol diminishes with the passage of time. (*Schmerber v. California, supra* (1966), 384 U.S. 757, 16 L.Ed. 2d 908, 920).

The scientific validity of blood-alcohol tests, when properly administered, is generally conceded. (*People v. Duroncelay* (1957), 48 Cal. 2d 766, 772, 312 P. 2d 690). The test itself does not declare guilt nor innocence, nor the fact of intoxication, which still is to be determined by the testimony of experts interpreting the test. (*People v. Conterno* (1959), 170 Cal. App. 2d Supp. 817, 824-825, 339 P. 2d 968). At the trial the defendant is allowed to cross-examine the individuals who administered the test and the expert who interprets the results of the test. (See: *Schmerber v. California, supra,* Transcript of Record, pp. 124-140, testimony of Geraldine

Lambert.) With the right to cross-examine the prosecution's witnesses as to the accuracy of the machine and to the qualifications of the individual administering the test, the petitioner's Sixth Amendment rights are not violated.

Petitioner claims that his right to counsel was violated because the Breathalyzer test was offered in the absence of petitioner's counsel. This theory was rejected in *Schmerber, supra,* when this court held that "since petitioner was not entitled to assert the privilege," he would have had no greater right if counsel had been present.

If this court were to apply petitioner's theory to crime investigation, then police could not take pictures of the scene of a crime, or take fingerprints from the premises, plaster molds of tire marks, or shoe imprints without the presence of the accused's counsel. The right to counsel should not be invoked to block scientific crime investigation. To preclude the police from using scientific crime detection would foster reliance instead on the very inquisitorial methods of law enforcement which this court has repeatedly found suspect.

Respondent contends that the petitioner had no constitutional right to decline the Breathalyzer test. In a day when excessive loss of life and property is caused by inebriated drivers, an imperative need exists for a fair, efficient and accurate system of detection, enforcement and, hence, prevention.

II.

Admission in Evidence of Petitioner's Refusal to Take the Breathalyzer Test Was Not a Violation of the Fifth, Sixth or Fourteenth Amendments to the Constitution of the United States.

Petitioner's refusal to take the Breathalyzer test was admitted in evidence as a "consciousness of guilt." Conduct indicating consciousness of guilt is not a testimonial statement of guilt and, therefore, is not protected by the privilege against self-incrimination. By acting like a guilty person a man does not testify to his guilt, but merely exposes himself to the drawing of inferences from circumstantial evidence of his state of mind. (*People v. Ellis* (1966), 65 A.C. 571, 579, 55 Cal. Rptr. 385, 421 P. 2d 393.)

The privilege against self-incrimination applies to evidence of "communications or testimony" of the accused, but not to "real or physical" evidence derived from him. (*Schmerber, supra*). The result of a Breathalyzer test falls within the category of real or physical evidence. (*People v. Bustos* (1966) 247 A.C.A. 429, 431, 55 Cal. Rptr. 603). Petitioner's refusal itself was not testimonial communication. It was circumstantial evidence of a consciousness of guilt.

The refusal to take the Breathalyzer test has the same probative value as does testimony that an accused attempted to fabricate an alibi (*People v. Allison* (1966), 245 A.C.A. 590, 598, 54 Cal. Rptr. 148), escape from custody (*People v. Otis* (1959), 174 Cal. App. 2d 119, 129, 344 P. 2d 342), fled the state because

he knew police were looking for him (*People v. Brooks* (1966), 64 Cal. 2d 130, 138, 48 Cal. Rptr. 379, 410 P. 2d 383) or attempted to have evidence against him retracted by a witness (*People v. Burton* (1961), 55 Cal. 2d 328, 347, 11 Cal. Rptr. 65, 359 P. 2d 433).

Acts of an accused designed to escape arrest, trial or conviction afford an inference of consciousness of guilt and are receivable against him as implied or tacit admissions. (*People v. Zavala* (1966), 239 Cal. App. 2d 732, 740, 49 Cal. Rptr. 129.) The admission into evidence of the petitioner's refusal to take the Breathalyzer test was not a violation of the privilege against self-incrimination. (*City of Dayton v. Allen* (1959), 200 N.E. 2d 356, 366; *State v. Durrant* (1963), 188 A. 2d 526; *State v. Smith* (1956), 230 S.C. 164, 94 S.E. 2d 886, 890; *State v. Benson* (1941), 230 Iowa 1168, 300 N.W. 275; *Gardner v. Commonwealth* (1954), 195 Va. 845, 81 S.E. 2d 614; *State v. Bock, supra* (1958), 80 Idaho 296, 328 P. 2d 1065, 1073.)

Evidence of the refusal is not only probative; its admission operates to induce suspects to cooperate with law enforcement officials. Only the overriding interest in protecting the privilege against compulsory self-incrimination, itself the result of a delicate balance, prohibits evidence or comment in the refusal to testify cases. But the privilege itself is not at issue here. Without exception, none of the reasons that support the privilege lends support to a rule that would exclude probative evidence obtained from an accused's effort to conceal non-privileged evidence.

A wrongful refusal to cooperate with law enforcement officers does not qualify for the protection that prohibits comment on a defendant's failure to testify at trial. (*Griffin v. California* (1965), 380 U.S. 609, 14 L. Ed. 2d 106.) Evidence of petitioner's refusal to take Breathalyzer test was not a violation of the Fifth Amendment privilege against self-incrimination.

Evidence of the refusal to give a breath sample is not a violation of the Sixth Amendment right to counsel. This right established in *Escobedo v. Illinois* (1964), 378 U.S. 478, 12 L. Ed. 2d 977 and *Miranda v. Arizona* (1966), 384 U.S. 436, 16 L. Ed. 2d 694 is designed to prevent the rise of coercive practices to extort confessions or other incriminating statements. There is no support in *Escobedo* or *Miranda* for invoking the right to counsel to block scientific crime investigation. (*People v. Graves* (1966), 64 Cal. 2d 208, 211, 49 Cal. Rptr. 386, 411 P. 2d 114; cert. denied, 385 U.S. 883, 17 L. Ed. 2d 111.)

Petitioner's refusal was properly admitted in evidence. This evidence was not a denial of the rights guaranteed by the Fifth, Sixth or Fourteenth Amendments of the United States Constitution. (*People v. Ellis, supra; People v. Sudduth, supra.*) The refusal to take the Breathalyzer test which operates to suppress evidence of intoxication, which disappears rapidly with the passage of time, should not be encouraged as a device to escape prosecution.

CONCLUSION.

The petition for Writ of Certiorari does not disclose that there has been a violation of petitioner's rights under the federal Constitution, nor does it show that the highest court of the State of California has decided a federal question in conflict with applicable decisions of this court, or decided a federal question of substance not theretofore determined by this court.

It is urged that the petition be denied.

Respectfully submitted,

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